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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 11

OTHELLO WASHINGTON and ELLEN P. WASHINGTON,
Petitioners

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on September 17, 1968.

CITATION TO OPINIONS BELOW

The memorandum opinion of the District Court printed in Appendix B hereto, *infra,* pp. 16a-20a is reported in 215 F. Supp. 359. The opinion of the Circuit Court of Appeals, printed in Appendix B hereto, *infra,* pp. 3a-11a is as yet unreported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on September 17, 1968. Rehearing was denied on October 11, 1968. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTIONS PRESENTED

1. In view of the decisions of this Court in *Marchetti* v. *United States,* 390 U.S. 39 and *Grosso* v. *United States,* 390 U.S. 62, can a Federal Court enforce a tax lien, where all of the evidence to support the assessment was acquired in a prior criminal proceeding involving violation of the wagering tax laws?

2. In a proceeding to subject property to a Federal tax lien, can a District Court order the sale of property free of the state-created right of dower of the taxpayer's wife?

STATUTES INVOLVED

The statutory provisions involved are Sections 4401 and 7403, Title 26, United States Code (1954 Internal Revenue Code) and Section 64-27 of the Code of Virginia (1950). These provisions are printed in Appendix A, *infra,* pp. 1a-2a.

STATEMENT

On May 2, 1961, officers of the Internal Revenue Service, after having obtained a search warrant based on evidence indicating a gambling operation, raided the farm of petitioner Othello Washington, (hereinafter referred to as "the taxpayer") (Tr. 2-34). At that time, gambling paraphernalia and records were seized on the basis of which an assessment of excise tax was computed (Tr. 34). The criminal proceedings

which followed ultimately led to the taxpayer's conviction and prison sentence on the charge of engaging in the wagering business without paying the special occupational tax (Criminal No. 3897, D. C. E. D. Va.). In the course of the criminal proceedings, the taxpayer challenged the search warrant on grounds of lack of probable cause. The validity of the warrant was upheld and the question was not again raised, either on self-incrimination or other grounds, at the time of the trial of this case. (Tr. 32). At that time, the petitioners conceded the validity of the warrant (Tr. 32).

The complaint in the District Court alleged that the taxpayer was indebted to the United States for wagering excise taxes and fraud penalties, assessed in accordance with §§ 4401 and 6653(b) of Title 26, U. S. Code, in the amount of $227,645.58, plus interest. The complaint further sought to subject to the Government's lien the taxpayer's farm property consisting of 393 acres, located in Loudon County, Virginia. (The same property which was raided in 1961, as mentioned above). The taxpayer disputed the amount of the assessment as well as the fraud penalty. In addition, petitioner Ellen P. Washington, the taxpayer's wife asserted her dower interest in the property. The Metropolitan Life Insurance Company claimed a prior lien on the property which all parties conceded to be superior to the Government's tax lien.

Following trial, the District Court rendered its decision which (1) disallowed the fraud penalty for lack of proof, (2) reduced the tax assessment slightly, (3) assessed a 25% deliquency penalty, and (4) contrary to the wife's contentions, held that her dower interest, although superior to the tax lien, did not prevent sale

of the land free and clear of such dower rights. (Appendix B, pp. 19a-20a). A Judgment and Decree for Sale of Real Property was entered in accordance with the foregoing rulings (Appendix B, pp. 12a-15a).

After notice of appeal, the Circuit Court of Appeals stayed further proceedings pending the decisions of this Court in *Marchetti* and *Grosso*. Subsequently, additional briefs were filed and oral argument was heard. On September 17, 1968, the Court of Appeals announced its opinion and entered judgment which affirmed in part and reversed in part the decision below (Appendix B, pp. 3a-11a). The reversal and remand were limited to the imposition of the delinquency penalty which the Government had agreed to be erroneous. (Appendix B, p. 11a). In all other respects, the decision of the District Court was affirmed. (Appendix B, p. 11a).

REASONS FOR GRANTING THE WRIT

I

Marchetti v. *United States, supra,* and *Grosso* v. *United States, supra,* both decided by this Court on January 29, 1968, unquestionably held that the wagering tax system of the Internal Revenue Code (Sections 4401 et seq., of Title 26, U. S. C.) insofar as the same requires registration by persons engaged in the business of wagering and the filing of excise tax returns, violates the Fifth Amendment to the Constitution. Unlike the instant case, *Marchetti* and *Grosso* were criminal cases in which this Court reversed convictions under circumstances where the defendants had unsuccessfully pleaded the self-incrimination privilege below. It is also true, as the Court of Appeals recognized, that this Court in the aforementioned opinion

made it plain that it was not holding an excise tax on wagering to be unconstitutional per se. However, we submit that the Court's remarks in this respect were directed toward possible alternative methods of achieving a legitimate tax objective. The constitutional defects found by this Court were not related to some ancillary or tangential aspect of the wagering tax scheme but they went to the heart of the statutes.

It is the *act* of registering as a gambler and the *act* of filing an excise tax return of wagering activities that carries within itself the hazard of self-incrimination. Accordingly, since enforcement of these tax laws depends on this mechanism, the continued operation of the system as now designed is not constitutionally permissible. This was recognized in the Court's rejection of the Government's suggestion in *Marchetti* and *Grosso* that restrictions should be imposed on the use of information gathered from the wagering tax by prosecuting officials. (390 U.S. 58-60, 69).

While we believe that this Court had no thought of preserving the wagering tax laws as presently constituted, we submit that the instant case does not present the question in that abstract form. Rather the problem posed for decision here is far more limited. As pointed out in the opinion of the Court of Appeals, the evidence which formed the basis of the assessment was acquired as a result of the raid on the taxpayer's farm which, in turn, was carried out as an incident to enforcement of the wagering tax laws. The fundamental problem thus presented is whether under such circumstances, a Federal Court can in the light of *Marchetti* and *Grosso* continue to enforce an assessment which in its entirety is the product of the execution of criminal laws now held to be in violation of constitutional rights.

We submit that the principles found in the decisions of this Court necessarily lead to the conclusion that no such enforcement should be permitted.

The answer of the Court of Appeals is that this Court's opinions referred to above have application to the criminal law only and do not affect the validity of civil tax liabilities. Moreover, the Court below holds that the criminal laws involved have continued vitality and it fully subscribes to the Government's contention that, notwithstanding *Marchetti* and *Grosso*, future search warrants may issue on probable cause, and presumably evidence may be seized and used in civil proceedings to enforce tax liabilities, even though it acknowledges that convictions may not be obtained (Appendix B, p. 9a).

This philosophy of the relationship between the criminal and civil law is indeed amazing. The conflict between this view and this Court's opinion in *One 1958 Plymouth Sedan* v. *Commonwealth of Pennsylvania*, 380 U.S. 693 is apparent. In that case, this Court held that in a civil forfeiture proceeding the evidence produced by an illegal search may not be utilized. See also: *Boyd* v. *U. S.*, 116 U.S. 616; *Rogers* v. *U. S.* (1st Cir. 1938), 97 F. 2d 691. The concept found in these cases is merely an elaboration of the maxim expressed by Mr. Justice Holmes in *Silverthorn Lumber Co.* v. *U. S.*, 251 U.S. 358, 391 (1920):

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."

To be sure, *Silverthorn* was a criminal case and *Boyd* and *One 1958 Plymouth* were forfeiture proceedings

which have generally been understood to be quasi-criminal. However, we submit that these are not meaningful distinctions. To be truly significant, constitutional protections should not merely inhibit the enforcement of the criminal law, but should likewise prevent the taking of property where such taking is the direct consequence of a violation of these rights. We understand this to be the underlying reason of the aforementioned opinions of this Court.*

In the aftermath of *Marchetti* and *Grosso*, the foregoing problem has received considerable attention by various Federal courts. The results have been conflicting. The petitioners' view has been followed in *U. S.* v. *Coin and Currency* (7th Cir. 1968) 393 F. 2d 499, cert. granted 11/18/68); *U. S.* v. *One 1967 Buick* (D. C. N. J. decided 9/16/68, 37 LW 2172); *U. S.* v. *$3,296.00 in currency,* (D. C. S. D. N. Y.) 286 F. Supp. 543 (1968); and rejected in *U. S.* v. *One 1965 Buick,* (6th Cir. 1968) 392 F. 2d 672, pet. for cert. pending.

We wish to mention only briefly the reference by the Court of Appeals to the taxpayer's failure to object to the validity of the search warrant. It is apparent that given the earlier decisions of this Court, now overruled, there could be no suggestion of a waiver. This was expressly recognized in Mr. Justice Harlan's opinion in *Grosso* (390 U.S. 71). See also: *Manfredonia* v. *U. S.* (2nd Cir. 1968) 391 F. 2d 229; *Greenwood* v. *U. S.* (4th Cir. 1968), 392 F. 2d 558. These are criminal cases. However, there can be no doubt that when petitioner's trial took place in 1965, they

*Even before *Marchetti* and *Grosso*, there was some authority for this proposition in the context of the wagering tax statutes. *U. S.* v. *Blank*, 261 F. Supp. 180 (1966); *Lassoff* v. *Gray*, 207 F. Supp. 843 (1962).

and the courts below were bound by *U. S.* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *U. S.*, 348 U.S. 419. They could not foresee the future rulings of this Court and they cannot be deemed to have waived an unannounced protection.

Finally, this is not a matter of retroactive application of a constitutional principle. This case was pending on direct appeal and there is no question of affecting pre-existing vested rights. *Linkletter* v. *Walker*, 381 U.S. 618; *Smith* v. *Hampton Training School for Nurses* (4th Cir. 1966), 360 F. 2d 577.

II

The second question presented involves a ruling by the Court of Appeals which is not only in conflict with the decision of another Circuit Court of Appeals, but is also at variance with the established law as interpreted by this Court.

It is conceded that under § 64-27 of the Virginia Code (1950), the taxpayer's wife is granted the inchoate right of dower in her husband's real estate. The District Court sustained the wife's claim in this respect, but held that in a proceeding under §7403, Title 26, U. S. C., the Court was authorized to sell the property "free and clear of all liens" (Appendix B, p. 20a). Accordingly, the District Court directed the sale at public auction, subject to the rights of the mortgagee and the dower interest of the taxpayer's wife, to be paid by reference to an actuarial computation (Appendix B, p. 13a). The Court of Appeals approved this ruling.

Both of the courts below base their decisions on *United States* v. *Trilling* (7th Cir. 1964), 328 F. 2d

699. In that case, it was held that when a Federal tax lien is enforced under § 7403, the Court can order the sale of property owned in joint tenancy to satisfy the individual tax liability of one of the owners and merely distribute the proceeds to the other joint tenant according to his interest. This decision is in direct conflict with *Folsom* v. *U. S.* (5th Cir. 1962) 306 F. 2d 361, where it was said:

> "It is our opinion that Section 7403 relates to the individual property of the delinquent taxpayer or to *his interest* in any property." (Emphasis that of Court).

We submit that *Folsom* rather than *Trilling* represents the correct view, for under § 7403(c), the Court "may decree a sale" only after it has ascertained the merits of all claims and interests. In our view, this means that there must be a prior determination of the nature of these interests under state law which necessarily includes the obligation to find whether they are capable of being sold.

These considerations are completely in harmony with *Aquilino* v. *U. S.*, 363 U.S. 509, and *U. S.* v. *Bess*, 357 U.S. 51, in which this Court has plainly stated that Federal law creates no property rights and that the tax lien attaches only to "property" or "rights to property" of the taxpayer, once their nature has been established by reference to state law.

It should be emphasized that at no stage of this proceeding have petitioners contended that the District Court did not have the authority to decree a sale of the subject property. However, we do contend that such sale may not be effected "free and clear" of dower. First, it should be noted that these words used by the

District Court are nowhere to be found in the statute. On the contrary, § 7403(c) states that the proceeds from a sale must be in accordance with the findings of the court "in respect to the interests of the parties and of the United States."

The answer to the problem posed must thus in the first instance depend on the nature of the dower right. The law of Virginia in this respect is clear. In *Harmon* v. *Peery*, 145 Va. 578, 134 S. E. 701 (1923), it was held that the purchaser at a judicial sale takes property *subject to* the wife's inchoate dower interest. The court there said: "It is conclusively presumed that he paid a price in keeping with the title he purchased." (134 S. E. 704). In the absence of a statutory provision to the contrary—and there is none here—this rule is consistent with the overwhelming weight of authority in this country. See: *Frain* v. *Burgett*, 152 Ind. 55, 50 N. E. 873 (1898); 28 Corpus Juris Secundum § 61; 25 American Jurisprudence, 2nd, § 151.

This Court in *Aquilino* left no doubt that the enforcement of Federal tax laws should not lead to the temptation to create a body of Federal property law. As stated by the Chief Justice at footnote 3 of the opinion:

> "It is suggested that the definition of the taxpayer's property interests should be governed by federal law, although supplying the content of this nebulous body of federal law would apparently be left for future decisions. We think that this approach is unsound because it ignores the long-established role that the States have played in creating property interests and places upon the courts the task of attempting to ascertain a taxpayer's property rights under an undefined rule of federal law. It would indeed be anomalous to say that the taxpayer's 'property and rights to

> property' included property in which, under the relevant state law, he had no property interest at all."

This case does not involve the resolution of conflicting claims to priority*, nor even the problem whether property could or should be sold. What it does involve is a ruling by the courts below that would dissolve and terminate a property interest granted by law. The very nature of dower makes it contingent on survival by one spouse of another. Barring an applicable statutory enactment, the United States is powerless to impose rules that would cause a fundamental change in nature and definition of such property rights. The division among the Circuit Courts of Appeal and the departure from the principles expressed by this Court on a matter of considerable public importance, justify the review requested here.

CONCLUSION

For the reasons heretofore stated, petitioners submit that the writ of certiorari should be granted.

Respectfully submitted,

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December 1968

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* "It is one thing to say that a taxpayer's property rights have been and should be created by state law. It is quite another thing to declare that in the interest of efficient tax administration one must look to Federal law to resolve the conflict between competing claimants of the taxpayer's state-created property interests." (Footnote 5, *Aquilino* v. *U. S.*, *supra*).

APPENDIX

APPENDIX A

Internal Revenue Code of 1954

Sec. 4401. Imposition of tax.

(a) *Wagers.*—There shall be imposed on wagers, as defined in section 4421, an exercise tax equal to 10 percent of the amount thereof.

* * * * * * * * * *

Sec. 7403. Action to enforce lien or to subject property to payment of tax.

(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof, whether or not levy has been made, the Attorney General or his delegate, at the request of the Secretary or his delegate, may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States under this title with respect to such tax or liability or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability.

(b) *Parties.*—All persons having liens upon or claiming any interest in the property involved in such action shall be made parties thereto.

(c) *Adjudication and Decree.*—The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, but the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States.

* * * * * * * * * *

Code of Virginia (1950)

§ 64-27. *Of what a widow shall be endowed.*—A widow shall be endowed of one-third of all the real estate whereof her husband, or any other to his use, was, at any time during the coverture, seized of an estate of inheritance, unless her right to such dower shall have been lawfully barred or relinquished; but if he dies wholly intestate and without issue of the marriage which was dissolved by his death or of a former marriage, his widow shall be endowed of one-third of such real estate, as aforesaid, and, in addition thereto, subject to the right of her husband's creditors, of all the residue of such real estate of her husband; or if he dies partially intestate and without any such issue, his widow shall be endowed of one-third of such real estate, as aforesaid, and, in addition thereto, subject to the rights of her husband's creditors and after the rights of the devisee or devisees under her husband's will shall have been fully satisfied, of all the residue, if any, of such real estate. (Code 1919, § 5117; 1922, p. 860; 1924, p. 460.)

APPENDIX B

[Filed September 17, 1968]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,766.

OTHELLO WASHINGTON and ELLEN P. WASHINGTON,
Appellants,

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Oren R. Lewis, District Judge.

(Argued June 17, 1968. Decided September 17, 1968)

Before BOREMAN, BRYAN and WINTER, Circuit Judges.

Werner Strupp (Whitford W. Cheston on brief) for Appellants, and John M. Brant, Attorney, Department of Justice, (Mitchell Rogovin, Assistant Attorney General, Lee A. Jackson, Joseph M. Howard, Attorneys, Department of Justice, Claude V. Spratley, United States Attorney, and John D. Schmidtlein, Assistant United States Attorney, on brief) for Appellee.

BOREMAN, Circuit Judge:

This is an appeal from a judgment of the district court ordering the public sale of certain real estate owned by taxpayer, Othello Washington, in satisfaction of the gov-

ernment's lien for excise tax deficiencies plus delinquency penalties and interest under federal wagering tax statutes.[1] The government's lien arises from a wagering tax assessment against Othello Washington imposed pursuant to Internal Revenue Code of 1954, 26 U.S.C. § 4401 (1964 ed.), plus a fifty percent fraud penalty assessed pursuant to 26 U.S.C. § 6653(b) (1964 ed.).

The complaint alleged that excise taxes and fraud penalties had been duly assessed pursuant to §§ 4401 and 6653(b) of the Internal Revenue Code; that there was an outstanding delinquency of $227,645.58 plus interest; that demand for payment had been made; that taxpayer was the owner of a farm consisting of 393 acres within the jurisdiction of the court; and that the Metropolitan Life Insurance Company and taxpayer's wife, Ellen, might claim an interest in the property. The complaint prayed that the government's lien be declared valid; that the interests of all parties be determined; and that the farm be sold and the proceeds be distributed. Taxpayer filed an answer alleging that the amount of the government's assessment was excessive. His wife, Ellen, answered alleging that she had a dower interest in the land.

In pretrial proceedings taxpayer admitted that he was liable for wagering excise taxes but stated that, while he had no records, the amount claimed was excessive and should be only about $97,000.00. At the trial there was testimony that Internal Revenue agents, after observing evidence indicating a gambling operation at the farm, obtained a search warrant, raided the premises on May 2, 1961, and discovered taxpayer in the act of conducting a gambling operation. Taxpayer conceded that the search warrant was properly issued and executed. His only defense, based solely on his own recollection, was that the amount of the assessment was excessive.

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[1] The district court's opinion is reported, United States v. Washington, 251 F. Supp 359 (E.D. Va. 1966).

The district court rejected taxpayer's testimony and upheld the section 4401 excise tax assessments against him (with a slight reduction to correct an error in the method of calculation) disallowing, however, the assessment of the fifty percent fraud penalty because of the lack of evidence to support it. From this disallowance the Government has not appealed. In view of the taxpayer's failures to file returns the court directed imposition of a twenty-five percent delinquency penalty but in its brief and at the bar of the court the Government concedes that the judgment should be reversed insofar as it awarded delinquency penalties for the reason that the Government had not sought the imposition of such penalties and the same had not been included in the assessment.

It was stipulated in the court below that the claim of the Metropolitan Life Insurance Company and the dower interest of taxpayer's wife were superior to the government's lien. The court directed that the farm of 393 acres owned by Othello Washington be sold at public sale free and clear of all liens and interests (including the wife's dower), the same to attach to the proceeds of sale.

During the pendency of this appeal and following the filing of appellants' brief, upon joint motion of the parties, this court entered an order directing that further proceedings be held in abeyance pending the decision of the United States Supreme Court in *Grosso* v. *United States.* On January 29, 1968, the Supreme Court handed down its decision in *Grosso* v. *United States,* 390 U.S. 62, and also in *Marchetti* v. *United States,* 390 U.S. 39, both cases dealing with various constitutional aspects of the wagering tax laws. Following these decisions, at the direction of this court, the appellants submitted a supplemental memorandum addressed to the questions decided by the Supreme Court in the two cases above noted.

Two questions are presented for our determination: (1) Whether the judgment against Othello Washington based

on the ten percent wagering excise tax, should be set aside because of the decisions of the Supreme Court in the *Grosso* and *Marchetti* cases; and (2) whether, in this action by the United States to enforce a federal tax lien (with respect to real estate), the trial court erred in ordering the sale of the real estate belonging to taxpayer free of the inchoate dower interest of taxpayer's wife.

Appellants seek an outright reversal of the judgment establishing the tax deficiency, solely on the basis of what they conceive and assert to be the necessary implications of the *Grosso* and *Marchetti* decisions. They contend that the wagering excise tax statute has now been declared to be wholly unconstitutional; and that, in any event, the government's computation of the tax assessed is based solely upon evidence which should be excluded because obtained under an invalid search warrant. We conclude that the appellants' reliance upon the *Grosso* and *Marchetti* cases to support their contention that the imposition of the excise tax was constitutionally impermissible is misplaced.

The language of the Supreme Court in both decisions above cited indicates no holding that the excise tax is constitutionally impermissible or even that a properly asserted claim of the privilege against self-incrimination would extinguish the liability for the payment of taxes. In *Grosso* the Court held only that a proper claim of privilege against self-incrimination precludes a *criminal conviction* based on the failure to pay the tax, while in *Marchetti* it was held that a proper claim of privilege against self-incrimination precludes a *criminal conviction* for willful failure to pay the $50 annual occupational tax, 26 U.S.C. § 4411, or to fulfill the registration requirements. The Court emphasized the nature of its holding in *Marchetti* as follows:

> "* * *. We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly

assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements. If, in different circumstances, a taxpayer is not confronted by substantial hazards of self-incrimination, or if he is otherwise outside the privilege's protection, nothing we decide today would shield him from the various penalties prescribed by the wagering tax statutes." 390 U.S. at 61.

Furthermore, in *Grosso,* where the petitioner had been convicted on charges of willful failure to pay the excise tax imposed on wagering by 26 U.S.C. § 4401, on charges of willful failure to pay the special occupational tax imposed by 26 U.S.C. § 4411, and on a charge of conspiracy to defraud the United States by evading payment of both taxes, the Court explicitly stated in footnote 7 (390 U.S. 62, at 69-70):

> "Section 4411 provides that the occupational tax must be paid 'by each person who is liable for tax under section 4401' and by each person who receives wagers for one liable under § 4401. It might therefore be argued that since petitioner is entitled to claim the constitutional privilege in defense of a prosecution for willful failure to pay the excise tax, he is thereby freed from liability for the occupational tax. *We cannot accept such an argument.* We do not hold today either that the excise tax is as such constitutionally impermissible, or that a proper claim of privilege extinguishes liability for taxation; *we hold only that such a claim of privilege precludes a criminal conviction* premised on failure to pay the tax." (Emphasis supplied.)

Appellants contend that the Court in *Grosso* nullified the excise tax and the entire self-assessment scheme for its collection and, having done so, the Court was merely suggesting in the footnote 7 quoted above that future legislation might devise a valid tax enforceable by different

methods not involving self-incrimination. We conclude, however, that the Court in *Grosso* carefully avoided holding that the tax itself was void. The court expressly stated:

> "We do not hold today * * * that a proper claim of privilege extinguishes liability for taxation; we hold only that such a claim of privilege precludes a criminal conviction premised on failure to pay the tax."

In view of the Supreme Court's express disclaimers, we are of the opinion that the civil liability here involved remains entirely valid and that the only question of a constitutional nature which could arise here would involve only a collateral matter such as whether the procedures used in this case for determining or collecting the tax were so violative of fundamental rights as to require the overturning of a judgment thus procured.

Appellants contend that the government's evidence was wholly founded on documents seized by Internal Revenue agents in the raid of the taxpayer's farm property and, consequently, the evidence "was acquired under circumstances which the highest Court has now declared to be in violation of fundamental constitutional rights." Admittedly, the evidence in support of the government's tax computations was based on numbers-game records seized in the raid. But in the proceedings below appellants did not challange the validity of the raid and the taxpayer's only objection was that the assessment of the tax due was excessive. At trial, appellants' counsel expressly stated that he did not question the validity of the search warrant under which the raid was conducted and he did not object to the admission in evidence of the material seized in the raid.

However, appellants now contend that the search warrant is invalid under the *Marchetti* and *Grosso* decisions. We find no support in those cases for appellants' contention. The Supreme Court did not invalidate the wagering tax

statutes; it did not abolish the criminal offenses therein specified; it did not say that an indictment or an information would not lie. The carefully circumscribed holding is that a defendant may not be *convicted* of a criminal violation of the wagering tax laws *if* he has properly claimed his constitutional privilege against self-incrimination. Under the circumstances, we conclude that where as here, there exists probable cause for belief that an offense has been committed (which appellants conceded) a valid search warrant may issue even though the Government may be unable to convict the defendant if he properly raises his claim of privilege against self-incrimination.[2] We hold that the judgment for wagering excise tax deficiencies rests upon a valid assessment and will be affirmed.

The more difficult problem before this court has to do with the propriety of the sale of the taxpayer's real estate free of his wife's contingent or inchoate dower interest. It is urged that this court should follow the decision in *Folsom* v. *United States,* 306 F.2d 361 (5 Cir. 1962), where it was held that 26 U.S.C. § 7403(c), which authorizes the court to order the sale of a taxpayer's *property,* refers to the taxpayer's "interest" in the property that is subject to sale rather than the "property" itself. Section 7403(c) reads as follows:

> "The court shall, after the parties have been duly notified of the action, proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of

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[2] In the instant case taxpayer, Othello Washington, did not raise the privilege against self-incrimination in the court below. It is true that in one of the two criminal cases which followed the search and seizure he moved to suppress the evidence obtained under the warrant on grounds other than self-incrimination. After that motion was denied he entered a plea of guilty in the related criminal case and was sentenced to imprisonment.

such property, by the proper officer of the court, and a distribution of the proceeds of such sales according to the findings of the court in respect to the interests of the parties and of the United States."

The appellants further argue that the trial court cannot modify the nature and extent of interests in property which are created by state law when that law provides that they are not subject to such termination. The case of *Harmon* v. *Peery*, 145 Va. 578, 134 S.E. 701 (1923), is cited in support of the argument that Virginia does not consider a wife's dower interest as passing to the purchaser at a judicial sale of the husband's real property.

We are disposed to follow the holding in *United States* v. *Trilling*, 328 F.2d 699 (7 Cir. 1964), which is in conflict with *Folsom*. *Trilling* is distinguishable from the instant case in that the husband taxpayer owned an undivided one-half interest in the subject real estate in joint tenancy with his wife. It was there held that the entire property, rather than merely taxpayer's interest therein, was subject to sale and that one-half of the proceeds should be applied to the satisfaction of the government's tax lien. We quote from *Trilling*, 328 F.2d 699 at 703, as follows:

"* * *. But in our judgment Folsom overlooks the fact that in § 7403 Congress has expressly authorized the district court to subject 'any property' in which the delinquent taxpayer 'has any right, title, or interest' to the payment of 'such tax or liability'; has required that 'all persons' claiming any interest 'in the property involved' be made parties to the proceeding; and has empowered the court to order a sale 'of such property' and direct distribution of the proceeds of such sale according to the 'interests of the parties and of the United States.' The express language of the statute negates any design or intent on the part of Congress to limit the reach of the statute to the 'interest' of the taxpayer as distinguished from the 'property' in which he has such 'interest'. This being

so we are of the view that a proper recognition of the teachings of Aquilino v. United States, 363 U.S. 509, 80 S.Ct. 1277, 4 L.Ed. 2d 1365 and United States v. Bess, 357 U.S. 51, 78 S.Ct. 1054, 2 L.Ed. 2d 1135, requires the conclusion that once the state law has been applied to ascertain the taxpayer's state-created property interests—to govern the determination of whether the taxpayer has 'property' or an 'interest in property' to which the lien attaches—we enter the province of federal law in subjecting the property involved to the discharge of the tax liability. As Mr. Chief Justice Warren had occasion to observe in Aquilino (363 U.S. 509 at 514, 88 S.Ct. 1277 at 1280-1281, 4 L.Ed.2d 1365): 'This approach strikes a proper balance between the legitimate and traditional interest which the State has in creating and defining the property interest of its citizens, and the necessity for a uniform administration of the federal revenue statutes.' "

We conclude that the wife's inchoate dower interest in the taxpayer's real estate is subject to termination by the sale of the taxpayer's property pursuant to the order of the district court under section 7403(c) which allows all claims to be determined and satisfied from the proceeds of such sale at public auction. The prior lien of Metropolitan Life Insurance Company and the properly ascertained value of the dower interest will be first satisfied from the sale proceeds and the balance applied to the tax lien.

The case is remanded to the district court for a recomputation to eliminate the delinquency penalty imposed, but in all other respects the judgment is affirmed.

Affirmed in part,
reversed in part,
and remanded.

IN THE UNITES STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA, VIRGINIA

Civil No. 3259

UNITED STATES OF AMERICA, *Plaintiff*

v.

OTHELLO WASHINGTON, ELLEN P. WASHINGTON, and METROPOLITAN LIFE INSURANCE COMPANY, *Defendants*

Judgment and Decree for Sale of Real Property

In accordance with the Memorandum Opinion entered by this Court on March 1, 1966, it is hereby

ORDERED that the plaintiff recover judgment against the defendant, Othello Washington, for wagering excise taxes, delinquency penalties, and interest to May 9, 1966 in the total amount of $232,033.93, plus interest at the rate of six percent (6%) per annum until paid, and costs of this action; and it is further

ORDERED that the plaintiff has a valid and subsisting lien in the amount of said judgment on certain real property of Othello Washington situated in Loudoun County, Virginia, which property is described as follows:

> That certain piece, parcel or tract of land, together with all the improvements thereon and appurtenances thereunto belonging, known as the "Old Thrift Farm" containing 393 acres, more or less, situate, lying and being near Waxpool, in Broad Run Magisterial District, Loudoun County, Virginia, adjoining and bounded by the lands now or formerly owned by Gulick, Moffett, Workman, Middleton, Ball, Ellzey and others, and bordering on the banks of Goose Creek.
>
> Being the same land conveyed unto J. W. Hoffman (also known as Joseph W. Hoffman) by Cecil Connor,

Trustee, and others, by deed dated November 24, 1923, and of record in the Clerk's Office of the Circuit Court of Loudoun County, Virginia, in Deed Book 9 R's, page 350.

and it is further

ORDERED that defendants Metropolitan Life Insuranc Company and Ellen P. Washington have liens upon said real property which are superior to the plaintiff's lien; and it is further

ORDERED that said real property be sold at public auction by a Special Commissioner of Sale to be apponted by this Court, and that the proceeds of sale, after deducting the expenses of sale and $50.70 as the cost of the transcript of the proceedings of this cause, be applied as follows:

First, in satisfaction of the balance due on the mortgage lien of Metropolitan Life Insurance Company (which amounted to $15,072.68 as of September 20, 1965), which balance, with interest, shall be computed by the Commissioner of Sale, and

Second, in satisfaction of the contingent dower interest of Ellen P. Washington to be computed by the Commissioner of Sale in accordance with Sections 55-275 and 55-269 of the 1950 Code of Virginia, and

Third, in satisfaction of the federal tax lien in the amount of $232,033.93 plus costs of this action, plus interest thereon at the rate of 6% per annum after May 9, 1966 as computed by the Commissioner of Sale, and

Fourth, any balance remaining shall be returned to the defendant, Othello Washington; and

it is further

ORDERED (1) that the sale of said real property be by public auction at a time and place to be announced by the

Special Commissioner of Sale, after first being advertised once each week for four consecutive weeks preceding the date of sale in a daily newspaper of general circulation in the County of Loudon, Virginia, and by such other notice as the Special Commissioner of Sale in his discretion may deem appropriate, and

(2) that no bid shall be accepted unless the same is accompanied by a certified check or cash deposit of at least ten percent (10%) of the amount of the bid, and

(3) that the balance of the purchase price shall be delivered to the Special Commissioner of Sale by the successful bidder within 30 days following the date of sale in the form of a certified check made payable to the Clerk of the United States District Court for the Eastern District of Virginia. In the event the successful bidder fails to fulfill this requirement, the deposit made by him shall be forfeited and applied toward the expenses of the sale and the property shall be re-offered for sale at said successful bidder's expense, and

(4) that the real property shall be sold free and clear of all liens and encumbrances except the amount of outstanding real estate taxes which shall be stated in the notice of sale and which shall be the obligation of the purchaser, and

(5) that the liens of the parties herein be released and removed from the subject property and shall attach in the same priority to the net proceeds of sale, and

(6) that the sale shall be subject to confirmation by the Court, and

(7) that, upon confirmation of the sale by the Court, the Special Commissioner of Sale shall execute and deliver his deed, with special warranty title, conveying said real property to the purchaser, and

(8) that, before entering his duties herein, the Special Commissioner of Sale shall give bond in the sum of

$25,000.00 with surety approved by the Clerk of this Court, conditioned upon the faithful performance of his duties; and it is further

ORDERED that this cause shall be continued for the appointment of the Special Commissioner of Sale, his report of sale and for further proceedings.

/s/ OREN R. LEWIS
United States District Judge

Entered May 24, 1966
Approved as to form:

/s/ JOHN D. SCHMIDTLEIN
John D. Schmidtlein
Assistant United States Attorney

/s/ THOMAS R. MANNING
Thomas R. Manning
Trial Attorney, Tax Division
U. S. Department of Justice

/s/ WERNER STRUPP
Werner Strupp
Sinrod and Tash
Counsel for Defendants
Othello and Ellen P. Washington

/s/ DUDLEY COCKE by J. S.
Dudley Cocke
Cocke & Taylor
Counsel for Defendant
Metropolitan Life Insurance Company

The Court hereby appoints Stanford E. Parris, Esq., of Fairfax, Va., as Special Commissioner of Sale, in the above styled case, with direction that he proceed with the sale of said property as above directed.
May 26, 1966

/s/ OREN R. LEWIS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
AT ALEXANDRIA

Civil Action No. 3259

UNITED STATES OF AMERICA, *Plaintiff*

v.

OTHELLO WASHINGTON, ET AL., *Defendants*

Memorandum Opinion

This is a civil action brought by the United States to enforce its lien for delinquent federal wagering excise taxes (Title 26, United States Code, § 4401) and to obtain a deficiency judgment against the defendant, Othello Washington.

The Government prays that the Court determine the merits of all claims to and liens upon certain real estate owned by the defendant, Othello Washington, and to decree the sale of the said property and a distribution of the proceeds in accordance with the Court's determination respecting the priority and rights of the parties herein.

It was stipulated by the parties that the record title to the land in question, known as the Old Thrift Farm in Loudon County, Virginia, is recorded in the name of the defendant, Othello Washington, subject to the prior lien of the Metropolitan Life Insurance Company and to the dower interest of Ellen P. Washington, the wife of the said Othello Washington, and that the wife's dower right and the Metropolitan lien are both superior to the Government's tax lien.

The matters in dispute here are the amount of the tax lien—whether the tax lien bears interest beyond the date of the recordation of the lien—whether the Government is entitled to the fifty per cent fraud penalty—and whether

the subject real estate should be sold free and clear of all liens and encumbrances or whether it should be sold subject to the wife's dower.

The Government recorded a tax lien for $252,580.64 against Othello Washington in the Clerk's office of Loudoun County, Virginia, on August 11, 1961. This lien included a fifty per cent fraud penalty plus interest computed to August 10, 1961.

The evidence introduced at the hearing discloses that Internal Revenue agents raided the Old Thrift Farm located in Loudoun County, Virginia, on May 2, 1961 and there found a numbers operation then being maintained and operated by the defendant, Othello Washington, and one Charles Anderson. Numerous records were then seized covering the gambling operations for the days April 28th and 29th and May 1st and 2nd of 1961, and the keep-in bets from August of 1960 to May of 1961. These records were used by the Commissioner in determining the amount of tax due by the defendant.

These records disclosed average daily bets for the four days of $5,822.21. The keep-in bets for the period August 1960 to May 1961 totaled $13,539.55. The keep-in bets for May 1st and 2nd averaged $631.87. The keep-in bets for the month of April averaged $310.90 per day. The keep-in bets for the four-day period (April 28-29, May 1-2) averaged $471.19 per day.

The Commissioner determined the tax due by adding the average of the two-day keep-ins ($631.87) to the average ($5,822.21) of the four-day daily bets and multiplied this sum ($6,454.08) by 255, the number of days here involved.

Othello Washington admitted that he was engaged in the numbers business headquartered at his Loudoun County farm during the period in question and that he

did not register,[1] file any returns, or pay any tax on his gross business.

He denied the correctness of the Government's computation of his gross income, claiming that the numbers business is seasonal and that the four-day period used to compute the daily bets and the two-day period used to compute the keep-ins covered the peak period. He claimed the Government had his records disclosing the actual keep-in bets for the period in question. He estimated his average daily wagers to be $3,800.00. This figure was based solely on the best recollection of his gross business. He kept and maintained no permanent records and had none except those seized by the Government during the raid.

> "It is a well established principle that in every case . . . the assessment of the Commissioner is presumed to be correct. To be sure, this presumption is not evidence in itself and may be rebutted by competent evidence . . ." See Compton v. United States, 334 F.2d 212, 4th Cir. 1964, and cases cited therein.

In a case such as this, where the question in issue is the validity of the tax lien, the taxpayer need show only that the assessment was invalid or that the Commissioner erred. See Helvering v. Taylor, 293 U.S. 507, wherein it was stated:

> "We find nothing in the statutes, the rules of the board or our decisions that gives any support to the idea that the commissioner's determination, shown to be without rational foundation and excessive, will be enforced unless the taxpayer proves he owes nothing or, if liable at all, shows the correct amount."

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[1] The defendant pleaded guilty before this Court to the charge of failing to register and pay the special wagering occupational tax for the period January 1 to May 2, 1961.

Applying the findings here made to the foregoing principles, the Court finds the assessment was without rational foundation and excessive.

Although the Commissioner need not compute the tax due with mathematical certainty, he should use the best evidence available, absent a rational reason for not so doing. Here the Government concedes the records seized reflect the total of the defendant's gambling activities for the four days in question. It justifies using the average for this period as the average play for the 255 days in question on the ground the four-day period included three low-play days and one high-play day (Government payday), yet it used only the high period (May 1st and 2nd) in computing the keep-in bets. No reasonable explanation was given for using the higher figure thus obtained.

To the tax thus computed the Commissioner imposed a fifty per cent fraud penalty.

The Commissioner justifies this penalty upon the defendant's admission that he had failed to register as required by law and had failed to maintain records of his wagering business, and had failed to file monthly returns and pay the excise taxes as required by law, and the fact that the headquarters for his numbers business was maintained on a farm located in Loudoun County, Virginia.

This is not enough. There is no presumption of fraud. To the contrary, the burden is upon the Government to prove fraud by clear and convincing evidence.

Cirillo v. Commissioner, 314 F.2d 478, 3rd Cir. 1963, holds

> ". . . [W]illful failure to file a timely return, which may create both criminal liability and an additional civil liability, does not in itself and without more establish liability for a fraud penalty, though it may be relevant in that connection."

Failure to timely file, absent clear proof of fraud, incurs a penalty of twenty-five per cent as provided for in 26 U.S.C.A., § 6651.

Section 6321 of Title 26, U.S.C.A., provides that interest accrues on taxes due after demand from that date to the date of payment.

Therefore, the Court concludes that the correct total of the Government's tax claim against the defendant, Othello Washington, to be in the sum equal to the average of the four-day play (April 28-29, May 1-2) multiplied by 255 (the number of days during the period in question), plus a twenty-five per cent penalty, with accrued interest after demand until paid.

Section 7403(c), Title 26, U.S.C.A., clearly gives this Court the right to finally determine the merits of all claims to and liens upon the property in question and to decree a sale of such property free and clear of all liens, and to distribute the proceeds of such sale according to the findings of the Court in respect to the interest of the parties and of the United States. Therefore, the Court will order a sale of the subject property free and clear of all liens, including the wife's dower, said liens to attach to the proceeds of said sale. See United States v. Trilling, 328 F.2d 699, 7th Cir. 1964.

The attorney for the Government should prepare an appropriate order awarding the Government judgment against Othello Washington for excise taxes due, and decreeing the sale of his Loudoun County farm, all in accordance with this memorandum opinion, submit the same to counsel for the defendants for approval as to form and to the Court for entry. The cost of the transcript ($50.70) should be taxed by the Clerk and paid from the proceeds of sale.

/s/ Oren R. Lewis
United States District Judge

March 1, 1966